United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1302

To be argued by
PETER M. BLOCH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1302

UNITED STATES OF AMERICA,
Appellee,

—v.—

FELIX ORTIZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Felix Ortiz appeals from a judgment of conviction entered on April 19, 1976, in the United States District Court for the Southern District of New York, after a plea of guilty before the Honorable Thomas P. Griesa, United States District Judge.*

* Ortiz pleaded guilty subject to the express condition that he preserve for appeal to this Court the legality of the search incident to his arrest. (App. 6a-7a). This Court has authorized this procedure. *United States* v. *Mullens*, — F.2d —, slip op. 4357, 4358 (June 23, 1976); *United States* v. *Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975); *United States* v. *Pond*, 523 F.2d 210, 212 (2d Cir. 1975); *United States* v. *Burke*, 517 F.2d 377, 379 (2d Cir. 1975).

Indictment 75 Cr. 1155 (TPG), filed in two counts on November 25, 1975, charged Felix Ortiz, Victoriano Perez, and Rigoberto Gonzalez in Count One with conspiring to possess and distribute heroin in violation of Title 21, United States Code, Section 846, and in Count Two with possession of approximately 1243.87 grams of heroin with intent to distribute it. On March 1, 1976, Ortiz moved in the District Court to suppress the fruits of a search made at the time of his arrest. On March 10, 1976, an evidentiary hearing was held before Judge Griesa, at the end of which Ortiz' motion was denied. On March 11, 1976, Ortiz pleaded guilty to Count Two of the Indictment.*

On April 19, 1976, Ortiz was sentenced to five years imprisonment, to be followed by a term of special parole of three years, to be served concurrently with a New York State sentence presently being served by Ortiz. Ortiz has been in custody since his arrest.

Statement of Facts

The only witness who testified concerning the arrest and search of Ortiz was Investigator Donald Klopfer of the New York City Police, who was then assigned to the New York Drug Enforcement Task Force.**

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* The remaining count against Ortiz was dismissed at the time of his sentence on April 19, 1976. Perez and Gonzalez also joined in part of Ortiz' motion to suppress evidence, and their motions were also denied on March 10, 1976. They each pleaded guilty to one count of the indictment on March 11, 1976, and on April 19, 1976, each of them was sentenced to one year in prison to be followed by three years of special parole. They have not appealed from their judgments of conviction.

** Another witness, Detective Angel Rodriguez, also assigned to the New York Drug Enforcement Task Force, testified about events subsequent to Ortiz' arrest that were relevant only to the motions filed by Perez and Gonzalez. (App. 89-115).

On October 30, 1975, Investigator Klopfer and Agent John Mullen of the Drug Enforcement Administration interviewed a defendant who had been arrested the day before in the act of selling five ounces of brown rock heroin (App. 21a).* That defendant (hereinafter referred to as the informant), after being warned of his rights, told the agents that the source of the heroin sales he had made, which amounted to 20 ounces during the preceding two months, was an Hispanic male named "Felix" who was about five feet eight inches tall, weighed 175 pounds, and wore eyeglasses and a moustache. (App. 22a). He further stated that this individual was on a work release program connected with the New York State Correctional Institute at 550 West 20th Street, Manhattan—Bayview Correctional Institute—and that he was employed in a Spanish grocery store on South 5th Street at Hooper Street, Brooklyn (App. 23a). "Felix," the informant continued, drove a late model blue Buick Electra with New York license plates to make deliveries of brown rock heroin in brown paper bags or shopping bags, depending on the quantity involved. On one occasion the informant observed Felix with one hundred ounces of [illegible]ly wrapped packages in a shopping bag. (App. 24a). The informant had learned from conversations with Felix that Felix's sources were two Cuban males. He believed that the Cubans were from lower Manhattan because he had observed Felix driving toward the Williamsburgh Bridge from Brooklyn to buy heroin. The informant said he believed that the two Cubans transported the heroin from California themselves. (App. 25a). The essentials of this debriefing were reduced to paper and signed by the informant. This document was introduced into evidence at the hearing (App. 25a-26a).

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* "App." refer to pages in the Appendix filed by the appellant.

On the day after the debriefing, Agent Klopfer visited the Bayview Correctional Institute and discovered through an inmate card check that only one inmate named Felix, one Felix Diaz Ortiz, was registered there. The card gave a Queens address, 3307 Junction Boulevard, believed to be the address of Ortiz' wife in Jackson Heights. (App. 27a). Klopfer then traced a New York Police number on the Ortiz card to the New York Police Department files, which contained Ortiz' arrest report and three photographs. (App. 28a). Klopfer also checked with the New York State Motor Vehicle Department and learned that a Felix Ortiz with an address at 1102 Eastern Parkway, Brooklyn, had a driver's license and a late model Buick Electra whose license plate number was 83DLC. (App. 29a).

Between October 31 and November 17, 1975, Agent Klopfer passed thorugh the vicinity of South 5th and Hooper Streets, Brooklyn, the location of the grocery store the informant described, and 3307 Jackson Boulevard, Queens, the address of his Bayview card. (App. 30). On several occasions he observed the Buick with license plate 83DLC parked in the vicinity of the Queens address. On November 6, at about 9 p.m., he observed the same car parked near the Brooklyn store. When a man entered the vehicle, Investigator Klopfer and a Police Officer Burbage followed. When the driver left the car and walked into a bar in the Williamsburgh section of Brooklyn, Agent Klopfer was able to view the suspect clearly at a distance of half a street block. After spending about 20 minutes in the bar, the suspect reentered the Buick and drove to West 19th Street Manhattan, where he was observed walking toward the Bayview Correctional Institute. (App. 32).

On November 13, Police Officer Frank Berberich, a member of the surveillance group, reported to Klopfer that he observed Ortiz removing a brown paper bag or shopping

bag from the trunk of one vehicle and placing it in the Buick on South Fifth Street, Brooklyn. (App. 87a).

On the morning of November 17, Agent Klopfer observed the Buick parked at the same Queens location where it had been seen on several previous occasions. (App. 33a). The suspect entered the vehicle alone and drove to Manhattan via the Williamsburgh Bridge. In court Agent Klopfer identified the driver as the defendant Orti.. (App. 38a). The auto traveled uptown, and, at the corner of 59th Street and Seventh Avenue, Agent Klopfer saw the Buick pull away from the curb with one passenger. (App. 39a). The car proceeded south on Seventh Avenue, turned eastbound on 57th Street, then proceeded northbound on Sixth Avenue. At one point Agent Klopfer could see the suspect conversing with the passenger. The car halted on the west side of Seventh Avenue between 57th and 58th streets. (App. 40a). Agent Klopfer then saw another man enter the car carrying a brown paper bag measuring approximately 8 inches by 12 inches. At this point the car immediately turned left onto 56th Street and abruptly pulled to the curb on the north side of the street, at which time the two men in the front seat exited (App. 41a), neither carrying the brown paper bag. (App. 43a). Klopfer identified these two in Court as the defendants Gonzalez and Perez (App. 42a). The pair entered a taxicab and Ortiz continued driving. As the Buick approached the Queens Midtown Tunnel, Klopfer pulled his car directly in front of it forcing it to stop. Klopfer and Officer Burbage, who was with him, approached the Buick on foot. Officer Burbage opened the door on the passenger side and removed a brown paper bag from the floor directly under or by the driver's seat. (App. 44a). Agent Klopfer asked Ortiz to step out, at which time Officer Burbage opened the package, and saw what was subsequently found to be more than a kilogram of brown rock heroin. He placed Ortiz under arrest. Agent Klopfer then frisked Ortiz and removed another package of brown

rock heroin from the left front pocket of his coat. (App. 45a). The car was seized.

Ortiz subsequently was warned of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), admitted his involvement in the heroin transaction, and aided the agents in the apprehension of Perez and Gonzalez later that day. (App. 46-50).

ARGUMENT

The Arrest of Ortiz was Based Upon Probable Cause to Believe That He Was and Had Been Dealing In Narcotics.

Ortiz claims that his arrest was not based upon probable cause, and that the arrest, together with the incident search and subsequent confession, were invalid.* This claim is meritless.

Ortiz' argument, while confusing, appears to be that since the informant in this case had not previously given

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* Ortiz appears to concede that if the arrest was valid the search was properly incident thereto. *United States* v. *Robinson*, 414 U.S. 218 (1973); *Gustafson* v. *Florida*, 414 U.S. 260 (1973); *Chimel* v. *California*, 395 U.S. 752 (1969). Indeed, probable cause to conclude that Ortiz had used to vehicle to distribute narcotics rendered it forfeitable under Title 21, United States Code, Section 881(a)(4), and terminated any further Fourth Amendment rights Ortiz may have had in it. *United States* v. *Zaicek*, 519 F.2d 412 (2d Cir. 1975); *United States* v. *Capra*, 501 F.2d 267, 280 (2d Cir. 1974). Conversely, the Government conceded at trial that if the search were ruled illegal, the subsequent confessions would necessarily be inadmissible since they would clearly have flowed from the initial illegality. *Brown* v. *Illinois*, 422 U.S. 590 (1975); *United States* v. *Tane*, 329 F.2d 848, 853 (2d Cir. 1964). Thus, the legal issue on appeal has clearly been focused on the legality of the arrest.

information to demonstrate his reliability, the information he gave did not constitute probable cause to arrest Ortiz. In making this argument, Ortiz relies primarily upon the decisions of the Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108, 109 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969), and their progeny. Ortiz' position is incorrect for at least three reasons.

First, his very reliance upon *Aguilar* and *Spinelli* is misplaced. As this Court has recently noted,

> ". . . there has been a growing recognition that the language in *Aguilar* and *Spinelli* was addressed to the particular problem of professional informers and should not be applied in a wooden fashion to cases where the information comes from an alleged victim of or witness to a crime."

United States v. *Burke*, 517 F.2d 377, 380 (2d Cir. 1975). See also *United States* v. *Rollins*, 522 F.2d 160, 164 (2d Cir. 1975). In this case, the informant was clearly not a "professional informer" and simply did not have any motivation to provide false information to the authorities. In fact, immediately prior to making his statement he had been arrested himself after having sold substantial amounts of heroin to an undercover agent. In that situation, providing demonstrably false information to the authorities, with whom he had agreed to co-operate, would clearly not be in his self-interest. Indeed, this Court has held that a confessed participant in a crime, rather than a professional tipster, does not require the sort of corroboration or prior reliability discussed in *Aguilar* and *Spinelli*. See *United States* v. *Miley*, 513 F.2d 1191, 1204 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); see also *United States* v. *Manning*, 448 F.2d 992, 997-1000 (2d Cir.) (en banc), *cert. denied*, 404 U.S. 995 (1971). Furthermore, the Supreme Court noted in *United States* v. *Harris*, 403 U.S. 573, 583-84

(1971) that when an informant admits his own participation in a crime, such an admission against penal interest itself is a sufficient indicium of reliability:

> "People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility, sufficient at least to support a finding of probable cause to search."

Id. at 583 (plurality opinion). See also *Quigg* v. *Estelle*, 492 F.2d 343, 345 (9th Cir. 1974); *Agnellino* v. *State of New Jersey*, 493 F.2d 714, 726 (3d Cir. 1974). Particularly since, as Investigator Klopfer observed, the informant had been warned that all his statements could be used against him (App. 21a), his admissions of his own dealings in narcotics with Ortiz and the details of those transactions were particularly reliable.

Second, even assuming the applicability of *Aguilar* and *Spinelli*, Ortiz' argument ignores the extensive and, indeed, almost total corroboration by the agents of the informant's information prior to the arrest. *Aguilar* and *Spinelli* hold that in order for probable cause to be based upon an informant's tip, the Government must show (1) that the informant had first-hand knowledge of the facts, and was not simply repeating a rumor and (2) that the information was reliable. Since the informant dealt directly with Ortiz on the narcotics transactions he described, the first test was clearly met. *United States* v. *Viggiano*, 433 F.2d 716, 719 (2d Cir. 1970), *cert. denied*, 401 U.S. 938 (1971). With respect to the second test, Ortiz overlooks this Court's recent admonition that the test is directed not simply to the credibility of the informant but to the reliability of his information. *United*

States v. *Canestri*, 518 F.2d 269, 272 (2d Cir. 1975). In this case, virtually every verifiable fact related to the agents and contained in the informant's written statement was corroborated by the agents prior to the arrest of Ortiz. These included the description of Ortiz; Ortiz' relationship with the Bayview Correctional Center; his approximate address and place of work; and his use of a late-model Buick Electra with New York license plates. Furthermore, the informant's description of his narcotics transactions with Ortiz precisely paralleled the events observed by Investigator Klopfer on the day of Ortiz' arrest: the use of the car and of brown paper bags; the entry to Manhattan by the Williamsburg Bridge; the meeting with two Hispanic males to effect a transfer of a package and the return to Queens, all exactly reflected the description of the informant's heroin deals with Ortiz.* This Court has held on numerous occasions that indepen-

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* Ortiz argued in the District Court, and appears to argue here, that since the informant did not specifically predict that Ortiz would deal in narcotics on November 17, 1975, his information could not provide probable cause for the arrest. This argument ignores two points. First, this Court has recently noted that it is reasonable to infer the continuation of demonstrated narcotics activity. See *Mapp* v. *Warden*, — F.2d —, Dkt. No. 75-2119, slip op. 2657, 2680 (2d Cir. March 16, 1976). Thus, the agents could quite reasonably believe that the events they observed on Novembr 17, 1975, were another narcotics offense of the sort described by the informant. Second, a Drug Enforcement Administration Agent is specifically authorized to "make arrests without warrant . . . for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed . . . a felony." Title 21, United States Code, Section 878(B). Thus, since the agents had probable cause at least to believe that Ortiz *had dealt* with the informant in the past in the pro-narcotics transactions described by the informant, they had the power to arrest him irrespective of the significance of his activities on the very day of the arrest. See also N.Y.C.-P.L., Section 140.10(2)(b) (McKinney's 1971) (police officers authorized to make warrantless arrest).

dent corroboration of the principal elements of an informant's statement itself constitutes a demonstration of reliability, irrespective of the lack of any track-record of previously reliable information. *United States* v. *Canestri, supra; United States* v. *Rollins, supra; United States* v. *Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972); *United States* v. *Unger*, 469 F.2d 1283, 1286 (7th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *United States* v. *Manning, supra*, 448 F.2d at 998-1000. See also *Draper* v. *United States*, 358 U.S. 307 (1959); *United States* v. *Harris, supra*, 403 U.S. at 381-83.

The facts in this case are substantially similar to those in *United States* v. *Gardner*, 436 F.2d 381, 382 (2d Cir. 1971), in which a search warrant was issued upon the information of an informant of previously untested reliability. Surveillance confirmed that the defendant lived in the apartment indicated by the informant, followed a routine near the asserted transaction spot "typical of a drug pusher", drove the car described, entered and left the apartment, then met with groups of 8 to 10 people "and exchanged something in front" of the location the informant identified. The Second Circuit held this "more than sufficient" to support probable cause under the *Aguilar* and *Spinelli* criteria.*

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* Ortiz' repeated reliance on *United States* v. *Gonzalez*, 362 F. Supp. 415 (S.D.N.Y. 1973), see Brief at 8, 12, 13, is misplaced. Indeed, the facts of that case dramatically support the correctness of the District Court's decision here. In *Gonzalez*, the District Court found no probable cause to arrest the defendant Torres upon a record remarkably similar to that in this case, but without the informer. While this holding might imply that the observations by Investigator Klopfer on November 17 would not *alone* have supported the arrest—although the trial court in *Gonzalez* found even that decision "difficult," see *id.* at 420—the availability and demonstrated accuracy of the informant's information provided the arresting agents with far more than the requisite probable cause to believe that Ortiz was and had been dealing in narcotics.

Finally, it is clear that the agents acted entirely reasonably and, indeed, with punctilious respect for the Fourth Amendment and proper arrest and seizure procedures. Since the principal issue was the validity of the arrest, the question was whether "the agents acted reasonably on the basis of all the facts at hand." *United States* v. *Tucker*, 380 F.2d 206, 212 (2d Cir. 1967). See also *South Dakota* v. *Opperman*, — U.S. —, 44 U.S.L.W. 5294, 5296 (July 7, 1976). The agents' care in debriefing the informant, methodically checking each point in his statement, and following Ortiz until it became overwhelmingly clear that Ortiz was indeed engaging in a narcotics transaction was a model of constitutionally permissible law enforcement. Their decision not to arrest Ortiz until their observations were complete and without waiting to procure an arrest warrant was not only responsive to the exigencies of the situation, as the District Court explicitly held (App. 132-33, 135), but was constitutionally proper. *United States* v. *Watson*, 423 U.S. 411 (1976); see also *United States* v. *Santana*, 44 U.S.L.W. 4970, (June 22, 1976). Furthermore, the fact that the agents inspected the contents of the bag before arresting Ortiz is insignificant. A search prior to arrest does not "render it [the search] illegal as long as probable cause to arrest existed at the time of the search." *United States* v. *Jenkins*, 496 F.2d 27, 73 (2d Cir. 1974). See also *United States* v. *Riggs*, 474 F.2d 699, 704 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). It follows that the arrest was proper in all respects.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

Frederick T. Davis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 30 day of August, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Frank Lopez, Esq.
31 Smith Street
Brooklyn NY.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this

30 day of August, 1976

Gloria Calabrese